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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE, U.S.N. COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF FORMER NATIONAL SECURITY OFFICIALS AND COUNTERTERRORISM EXPERTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former national security officials and counterterrorism experts who have been working in this field for many decades.[2]

On December 12, 2001, Petitioner Ali Saleh Kahlah al-Marri was arrested in Illinois, where he lived with his wife and children, and eventually charged with crimes. On June 23, 2003 the charges were dismissed at the government's request. President Bush subsequently executed a declaration asserting that al-Marri was closely associated with al Qaeda. The government's allegations, if proven, would support conviction for violation of criminal statutes proscribing engagement in terrorism.[3] But no charges were brought and no crimes were prosecuted. Instead, Mr. al-Marri was transferred to Department of Defense custody, designated an "enemy combatant," and consigned to im-

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

[2] The Addendum attached hereto contains a list of the *amici*, along with biographical information for each.

[3] *See Al-Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (Motz, J., concurring) ("Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the convicted September 11th conspirator, [al-Marri, or similarly situated America citizens] could be tried on criminal charges and, if convicted, punished severely.").

prisonment for an indefinite duration under severe conditions.

The government contends[4] that national security concerns support its claim of inherent and statutory authority to seize and detain indefinitely as "enemy combatants" individuals like Mr. al-Marri, who are legally present in the United States and are suspected of involvement in terrorism. We submit this brief because our experience with the nature of contemporary terrorism threats leads us to conclude that this approach to "terrorism suspects"[5] seized in the United States in fact *undermines* our national security, and greatly burdens the work and mission of those who now labor to keep the Nation safe.

Based on our expertise and experience, it is our firm conviction – and, we believe, the consensus among nearly all terrorism experts – that terrorism cannot be defeated by military action alone. Effective counter-terrorism efforts focus on eliminating popular support, particularly vis-à-vis recruitment. That, in turn, requires confronting the terrorist narrative and revealing its lies. Demonstrating our commitment to equality, justice, and the rule of law supports a counter-narrative that is essential to that effort and, we submit, to our national security.

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[4] *Amici* refer to the arguments previously made by the government. The new administration may present different arguments.

[5] Although we refer to Mr. al-Marri as a "terrorism suspect," in fact, he has been held for years, as if he had been convicted, solely on the say-so of the Executive.

SUMMARY OF ARGUMENT

The government defends its indefinite military imprisonment of Mr. al-Marri as an enemy combatant on the allegation that he was "closely associated" with al Qaeda and had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. App. 466a.

Committing or conspiring to commit acts of terrorism is a crime that may be prosecuted and punished under a variety of criminal statutes enacted by Congress.[6] Subjecting individuals apprehended inside the United States to indefinite military imprisonment as enemy combatants, instead of putting them on trial, invigorates the false – but widely accepted – narrative that the United States is engaged in a war on Islam, using its vast power to victimize Muslims, and that the terrorist is a noble warrior engaged in a holy war. Such treatment of a terrorism suspect is so far outside the traditions of this Nation that it undermines the credibility of our commitment to equality, justice, and the rule of law. The result is a powerful recruitment tool for violent extremists who claim allegiance to Islam, and greater risk to the security of the Nation.

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[6] *See* Br. *Amicus Curiae* of Former Federal Judges and Former Senior Justice Department Officials in Support of Petitioner (filed October 23, 2008) at 4-5 (citing statutes); Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Human Rights First 2008).

America, too, has a powerful tool in this "battle for hearts and minds." It is our commitment to our ideals. Like many other experts in national security and counterterrorism, we have come to understand that our national security depends upon undermining the terrorist narrative. Treating suspects seized in the United States according to our long-held principles, presenting charges and the opportunity for a trial, affirms our commitment to those ideals and discredits the terrorists' lies. In contrast, indefinite military detention of these suspects fuels the narrative that terrorists promote and undercuts our own. In so doing, it runs counter to effective counterterrorism strategy. As President Obama said:

> [I]t is precisely our ideals that give us the strength and the moral high ground to be able to effectively deal with the unthinking violence that we see emanating from terrorist organizations around the world.

President Barack Obama, Remarks at the White House Following Signing of Executive Orders (Jan. 22, 2009).

ARGUMENT

A. Indefinite Military Detention Of Persons Lawfully Residing In The United States, Without Criminal Charge Or Trial, Threatens To Undermine Our National Security.

1. We will not prevail against violent extremists by military force alone; drying up terrorist recruitment and support is essential to our national security.

We and other experts on national security and violent extremism have reached the same conclusion: the current terrorist threat cannot be defeated by the military alone.[7] Rather, the national security of the United States depends upon successfully waging what has variously been called an ideological struggle, "the

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[7] In a February 17, 2006 speech to the Council on Foreign Relations, Secretary of Defense Donald Rumsfeld said that some of the United States' most critical battles were now in the "newsrooms": "Our enemies have skillfully adapted to fighting wars in today's media age, but . . . our country has not," he said. New Realities in the Media Age: A Conversation with Donald Rumsfeld (Feb. 17, 2006) (transcript *available at* http://www.cfr.org/publication/9900/); Office of the Executive, National Strategy for Combating Terrorism 30 (Feb. 2003), *available at* http://www.state.gov/documents/organization/60172.pdf ("[T]he best antidote to the spread of terrorism" is building "a world consistent with the interests and values we share with our partners – values such as human dignity, rule of law, respect for individual liberties . . .").

battle for hearts and minds," and a battle between competing narratives. As Secretary of Defense Robert M. Gates observed:

> What is dubbed the "war on terror" is, in grim reality, a prolonged, worldwide irregular campaign – a struggle between the forces of violent extremism and those of moderation. Direct military force will continue to play a role in the long-term effort against terrorists and other extremists. But over the long term, the United States cannot kill or capture its way to victory.

Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, Foreign Affairs, Jan./Feb. 2009, at 28, 29.[8]

In a recent town hall meeting, Secretary Gates explained the crucial importance of defeating terrorist recruitment efforts. "[T]here are a lot of people out there who are susceptible to [the extremists'] message, who are susceptible to being recruited. And we have the opportunity to . . . keep them from turning to the extremists so that in fact we're dealing with a handful of fanatics instead of a larger group of people who are disaffected and who have come to hate us . . . ." Town Hall Meeting with Secretary Robert Gates at Balad Air Base, Iraq (Dec. 14, 2008) (transcript *available at*

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[8] General John P. Abizaid (Ret.), the former Commander of the United States Central Command, has described the struggle as "a war of intelligence and a war of perceptions." David W. Barno, *Challenges in Fighting a Global Insurgency*, Parameters: U.S. Army War College Quarterly, Summer 2006, at 15, 21.

http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4333).[9]

Stephen Hadley, National Security Adviser to President George W. Bush, also stressed the importance of competing with the terrorist vision: "It is more than just a military war on terror. It's broader than that. It's a global struggle against extremism. We need to dispute both the gloomy vision and offer a positive alternative." Eric Schmitt & Thom Shanker, *Washington recasts terror war as 'struggle,'* International Herald Tribune, July 27, 2005, at A8.

Hank Crumpton, former U.S. Ambassador for Counterterrorism and long-time counterterrorism official at the Central Intelligence Agency, has testified about the imperative to "replace an ideology of hatred with an ideology of hope. Over the long term, our most

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[9] *See also* Daniel S. Roper, *Global Counterinsurgency: Strategic Clarity for the Long War*, Parameters: U.S. Army War College Quarterly, Autumn 2008, at 92, 100-01 ("The most important components of the strategy is countering ideological support for terrorism – the 'decisive effort'.") (citing Joint Staff, J-5 briefing, *Combating Terrorism: The Long War*, December 2007)); Michael Chertoff, *Preventing Terrorism: A Case for Soft Power*, Harvard International Review, Summer 2008, at 14 ("The United States must fight not only the extremists, but the ideology of their extremism. It must stand firmly against malignant ideas which can only cause further poverty, degradation, and hopelessness by turning the clock back centuries. It must offer the alternative ideals of liberty and democracy, ideals which have brought more progress to more people over the past few centuries than in all the prior centuries combined. In other words, as during the Cold War, the situation must be seen as a war against an ideology, a contest of ideas, and a battle for the allegiance of men and women around the world.").

important task ... is not the 'destructive' task of eradicating enemy networks, but the 'constructive' task of building legitimacy, good governance, trust, prosperity, tolerance, and the rule of law." The Changing Face of Terror: A Post 9/11 Assessment: Hearing Before the S. Comm. on Foreign Relations, 109th Cong. 9 (June 13, 2006) (statement of Ambassador Henry A. Crumpton, Coordinator for Counterterrorism, U.S. Dep't of State), *available at* http://www.investigativeproject.org/documents/testimony/256.pdf.

President Obama's actions and words on his third day in office demonstrate his administration's determination that the struggle against violent extremists must be waged not only with military force but also with actions that reaffirm our commitment to equality, justice, and respect for the rule of law. Signing a series of Executive Orders to accomplish precisely that objective, he explained:

> The message we are sending around the world is that the United States intends to prosecute the ongoing struggle against violence and terrorism, and we are going to do so vigilantly; we are going to do so effectively; and we are going to do so in a manner that is consistent with our values and our ideals.
>
> We intend to win this fight. We are going to win it on our terms.

President Barack Obama, Remarks at the White House Following Signing of Executive Orders (Jan. 22, 2009); *cf.* President Barack Obama, Inaugural Address (Jan. 20, 2009) ("[O]ur power grows through its pru-

dent use; our security emanates from the justness of our cause, the force of our example; the tempering qualities of humility and restraint.").

2. Terrorists employ a false narrative about the objectives and values of the United States to glorify their heinous acts and promote recruitment.

Terrorism has been a part of human conflict forever. Our time has seen the flowering of a brand of terrorism practiced by those who claim to be engaged in a holy war.[10] Practitioners of this brand of terrorism invoke an inspirational mythology: they call themselves jihadists, soldiers in a holy war sanctioned by God, in order to ennoble what is otherwise ignoble conduct. Such terrorists confront in us a wealthier and profoundly more powerful adversary, and have made a virtue of necessity by developing a narrative of martyrdom. But martyrdom by definition destroys itself unless the martyr inspires successors to imitation. The practitioner of this brand of terrorism thus depends heavily on the inspirational power of his narrative. *See* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 3 (Jan. 2008),

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[10] The religious affiliation claimed is Islam, although the practice of violent acts against civilians is antithetical to it. In discussing the current terrorist threat to our national security, and the "terrorist narrative," we focus, as the government does in seeking to justify the indefinite military detention of Mr. al-Marri, on those violent extremist groups, like al Qaeda, that falsely claim a basis in Islam for their acts.

available *at* http://www.dhs.gov/xlibrary/assets/dhs_crcl_terminology_08-1-08_accessible.pdf ("What terrorists fear most is irrelevance; what they need most is for large numbers of people to rally to their cause.").

Terrorist groups such as al Qaeda work hard, especially on the Internet, to promote their vision of a glorious global jihad against a hypocritical West – in particular, the United States – that is said to be waging war on Islam.[11] As the Department of Homeland Security describes it: "Bin Laden's narrative presumes a war against Islam and rampant mistreatment of Muslims by the American and other Western governments." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 8-9 (Jan. 2008).

Our national security depends, in part, upon drying up support for groups like al Qaeda, and this is done most effectively by exposing their narrative as false. Military "detention" of individuals seized in the

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[11] *See, e.g.*, Osama bin Laden, *Letter to the American People*, The Guardian, Nov. 24, 2002, *available at* http://www.guardian.co.uk/world/2002/nov/24/theobserver ("Let us not forget one of your major characteristics: your duality in both manners and values; your hypocrisy in manners and principles. . . . You have claimed to be the vanguards of Human Rights . . . . However, all these things vanished when the Mujahideen hit you . . . . In America, you captured thousands the Muslims and Arabs, took them into custody with neither reason, court trial, nor even disclosing their names.").

United States has precisely the opposite effect, and indeed fuels that narrative.

3. Imprisoning Mr. al-Marri without trial instead of bringing criminal charges against him serves the terrorist narrative and threatens our national security.

a. Imprisonment without trial of individuals seized inside the United States promotes the false narrative of a United States engaged in a war on Islam and Muslims, which the terrorists exploit for recruitment.

Seizing individuals off the streets of America, declaring them enemy combatants, and asserting the right to keep them locked up indefinitely, with no formal charges or trial, is so far outside the traditions of fundamental fairness on which this Nation was founded that it perpetuates the perception generated by al Qaeda that we have abandoned our commitment to the rule of law.

We recognize that the security threat springs from the terrorists: U.S. policies and actions in no way justify the conduct of the terrorists. But the perception that the United States is failing to act in accordance with its fundamental values feeds the terrorist narrative, and thus undermines our efforts to confront the terrorist threat.[12]

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[12] *Amici* believe that combatant detentions authorized by this Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) – i.e., of individuals seized on the battlefield in Afghanistan, and participating

The significance of this dynamic is now broadly understood. As Retired General Wesley Clark said in an article about this very case:

> [Treating al-Marri as an enemy combatant] endangers our political traditions and our commitment to liberty, and further damages America's legitimacy in the eyes of others. . . . We train our soldiers to respect the line between combatant and civilian. Our political leaders must also respect this distinction, lest we unwittingly endanger the values for which we are fighting, and further compromise our efforts to strengthen our security.

Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. Times, Aug. 8, 2007, at A19.

Jeffrey H. Smith, former CIA General Counsel, testified before the Senate Armed Services Committee in 2007: "In our efforts to get tough with the terrorists we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war. In six short years, our disregard for the rule of law has undermined our standing in the world

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in active hostilities against U.S. military forces and their allies there – are fundamentally different from indefinite military detention without charge of an individual lawfully present in the United States on the claim that he is engaged in criminal terrorist activities. As noted elsewhere in this brief, the latter is clearly not consistent with well-established principles and practice regarding individuals taken into custody inside the United States. Moreover, the United States is not a zone of active combat and the challenges of gathering and preserving evidence present in a zone of active combat do not apply.

and, with it, our ability to achieve our objectives in the broader war." Meeting to Receive Testimony on Legal Issues Regarding Individuals Detained by the Department of Defense as Unlawful Enemy Combatants: Hearing Before the S. Comm. on Armed Services, 110th Cong. 3 (Apr. 26, 2007) (statement of Jeffrey H. Smith, Senior Partner, Arnold & Porter LLP), *available at* http://armed-services.senate.gov/statemnt/2007/April/Smith%2004-26-07.pdf.

One reason the United States does not face the level of homegrown terrorism threat that Europe has experienced is that immigrants are better integrated into American society. *See* James Fallows, *Declaring Victory*, The Atlantic, Sept. 2006, at 60 ("Something about the Arab and Muslim immigrants who have come to America, or about their absorption here, has made them basically similar to other well-assimilated American ethnic groups – and basically different from the estranged Muslim underclass of much of Europe."). Working with these Muslim communities in the United States, and building trust, is one of the most promising avenues for deterring young people from extremism. *See* Muslim Public Affairs Council, *The Impact of 9/11 on Muslim American Young People* 1 (June 2007) ("The more narrow the orbit of acceptance is toward young Muslims who are traversing the various stages of adolescence toward becoming young professionals, the more likely we will begin to see serious cases of radicalization that can evolve into trends."), *available at* http://www.mpac.org/publications/youth-

paper/MPAC-Special-Report--Muslim-Youth.pdf.[13] *See also* Stephen Magagnini, *Local FBI chief rebuilds trust with Muslim leaders*, Sacramento Bee, Dec. 1, 2008, *available at* http://www.sacbee.com/101/story/1438316.html.

Policies that drive a wedge between these communities and the government or the rest of society frustrate efforts aimed at increasing trust and understanding and, instead, increase a sense of alienation. In 2008, the Department of Homeland Security issued a memorandum that reflects how seriously those with responsibility for protecting the territory and people of the United States take the battle for hearts and minds. It concludes that "Bin Laden and his followers will succeed if they convince large numbers of people that America and the West are at war with Islam and that a 'clash of civilizations' is inherent." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 7 (Jan. 2008). The DHS memorandum

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[13] *See also* Roots of Violent Islamic Extremism and Efforts to Counter It: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 110th Cong. 2 (July 10, 2008) (statement of Michael Leiter, Director, NCTC), *available at* http://www.nctc.gov/press_room/speeches/7-10-shsgac-radicalization-sfr.pdf ("There is no single underlying catalyst for the initial stages of radicalization. Although most individuals reject extremism outright, personal frustration at perceived social injustice and other grievances can prompt individuals to reassess their accepted worldview and be more open to alternative perspectives – some of which espouse violence. . . . Violent extremist groups try to foster and take advantage of this period of reassessment through propaganda and public outreach.").

emphasized the importance of conveying the message that "Muslims have been, and will continue to be part of the fabric of our country. . . . We must emphasize that Muslims are not 'outsiders' looking in, but are an integral part of America and the West." *Id.* at 8.

This essential message is dramatically undermined by seizing and indefinitely detaining Muslims inside the United States on the basis of an executive branch allegation that they are enemy combatants. While this policy may not expressly target Muslims, it has been applied only against Muslims, as have nearly all of the harsh policies adopted after 9/11.[14] This fuels the terrorist narrative of a war on Islam.

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[14] All of the individuals known to have been subjected to enhanced interrogation techniques have been Muslims, as are all the individuals who have been detained at Guantanamo Bay prison. When the government arrested more than 1100 people in secret in the weeks after 9/11 and held many of them illegally without charge in prisons, it targeted only Arabs and Muslims (apparently not understanding that not all Arabs are Muslims). *See* U.S. Dep't of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection With the Investigation of the September 11 Attacks (Apr. 2003), *available at* http://www.usdoj.gov/oig/reports/FBI/index.htm. And the National Security Exit and Entrance Registration System program (which required fingerprinting, photographing, an immigration interview, and repeated "check-ins" for all males over age 16 who came here from countries with suspected links to terrorism) created enormous fear and mistrust in Muslim communities. *See* Philip Heymann, James Barr Ames Professor of Law, Harvard Law School, Muslims in America After 9/11: The Legal Situation 10-11 (Dec. 2006), *available at*

The DHS memorandum clearly explains the danger inherent in inadvertently reinforcing al Qaeda's propaganda. "Bin Laden's narrative presumes a war against Islam and rampant mistreatment of Muslims by the American and other Western governments. Extremist recruiters argue that Muslims should segregate from the larger society; moreover, their recruitment pitch depends on isolation." Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 8 (Jan. 2008).

The terrorist seeks to undercut an individual's sense of identity as a Muslim citizen of a state that values fair treatment and protects fundamental human rights. Policies that appear to accord Muslim suspects less than full equality under the law reinforce this dangerous and misleading message. *See* Islamic Extremism in Europe: Hearing Before the Subcomm. on European Affairs of the S. Foreign Relations Comm., 109th Cong. 7 (Apr. 5, 2006) (statement of Daniel Fried, Assistant Secretary of State for European Affairs), *available at* http://foreign.senate.gov/testimony/2006/FriedTestimony060405.pdf ("[W]e must also intensify our efforts to counter the extremist ideas that drive Islamic terrorism. . . . It . . . requires us to demonstrate through our own nation's experience that Muslims can be patriotic, democratic, and religious at the same time.").

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http://www.ces.fas.harvard.edu/conferences/muslims/Heymann.pdf.

Senior Counterterrorism Analyst Gina Bennett, until recently the Deputy National Intelligence Officer for Transnational Threats, first highlighted the national security risk of a double standard in an intelligence assessment written back in 1993, which also provided the first serious warning about Usama Bin Laden. That assessment, titled "The Wandering Mujahidin: Armed and Dangerous," concludes: "The growing perception by Muslims that the U.S. follows a double standard with regard to Islamic issues – particularly in Iraq, Bosnia, Algeria, and the Israeli-occupied territories – heightens the possibility that Americans will become the targets of radical Muslims' wrath. Afghan war veterans, scattered through the world, could surprise the U.S. with violence in unexpected locales." Gina Bennett, *The Wandering Mujahidin: Armed and Dangerous*, Weekend Edition (U.S. Dep't of State, Bureau of Intelligence and Research), Aug. 21-22, 1993, at 5, *available at* http://www.nationalsecuritymom.com/3/WanderingMujahidin.pdf. The foresight of this analysis was tragically proven on September 11, 2001. The danger to Americans of sending a message that the United States has a double standard for Muslims can no longer be viewed as hypothetical.

Nor is the impact of such messages considered hypothetical by those serving in Iraq and Afghanistan. As former Navy General Counsel Alberto Mora has testified, "there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and

Guantánamo." Hearing on the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Services, 110th Cong. 5 (June 17, 2008) (statement of Alberta Mora, General Counsel, Dep't of the Navy), *available at* http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf. Again, harsh policies and actions that were directed only against Muslims fueled recruitment efforts, with direct and deadly consequences.

b. Military detention of Mr. al-Marri feeds the false narrative that the terrorists are holy warriors.

By treating a terrorism suspect apprehended within the United States as an "enemy combatant," rather than as a criminal suspect, we grant the suspect the very status a terrorist seeks, a status widely honored by those to whom terrorists propound their narrative. *See* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 9 (Jan. 2008) ("Words matter. The terminology the [United States] uses should convey the magnitude of the threat we face, but also avoid inflating the religious bases and glamorous appeal of the extremists' ideology. Instead, [United States'] terminology should depict the terrorists as the dangerous cult leaders they are. They have no honor, they have no dignity, and they offer no answers. While acknowledging that they have the capacity to destroy, we should constantly emphasize that they cannot build societies, and do not provide solutions to the problems people across the globe face.").

The dilemma we create for ourselves takes on particular force where, as here, military imprisonment is indefinite.[15] As a military captive, the terrorism suspect is the continuing object of our own military force, and by imposing that force for an indefinite period of time, we continue to validate the terrorist narrative of the warrior and martyr. The prisoner may be regularly, if not constantly, in the public's mind, always available as a source of inspiration.

For example, a relatively insignificant Sudanese cameraman named Sami al Hajj became famous around the world by the mere fact of his long impris-

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[15] Mr. al-Marri's indefinite imprisonment has received significant attention in the Arab press. *See Detention of Qatari 'enemy combatant' flayed*, Al Jazeera, June 24, 2003, *available at* http://english.aljazeera.net/archive/2003/06/200841010357288816.html ("There are no plans to move al-Marri to a military prison at the U.S. Navy Base in Guantanamo Bay, Cuba where 680 suspects are being held in inhumane conditions without charge as part of Washington's 'war on terror.'"); *U.S. Told to Free 'Enemy Combatant,'* Al Jazeera, June 12, 2007, *available at* http://english.aljazeera.net/news/americas/2007/06/200852514462 3696313.html; *U.S. Court to Rule on 'al-Qaeda' case*, Al Jazeera, Dec. 6, 2008, *available at* http://english.aljazeera.net/news/americas/2008/12/200812519318 473235.html (stating al-Marri "has been held in virtual isolation on a U.S. navy prison ship near Charleston, South Carolina for almost five and a half years"); *Order to Review Case of Enemy Combatant*, Gulf Times, January 24, 2009, *available at* http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=268479&version=1&template_id=43&parent_id=19; *Campaign for Qatari's Release From U.S. Prison*, The Peninsula, Jan. 17, 2009, *available at* http://www.thepeninsulaqatar.com/Display_news.asp?section=Local_News&subsection=Qatar+News&month=January2009&file=Local_News2009011754945.xml.

onment at Guantanamo Bay as an enemy combatant. His captivity was regularly reported by al Jazeera and other Arabic news outlets, and closely followed by the more than a billion people reached by those outlets. *See, e.g., Profile: Sami al-Hajj*, Al Jazeera, May 2, 2008, *available at* http://english.aljazeera.net/news/americas/2008/05/200861505753353325.html; *Sami al-Hajj Hits Out at U.S. Captors*, Al Jazeera, May 31, 2008, *available at* http://english.aljazeera.net/news/africa/2008/05/20086150155542220.html.

In contrast, treating the terrorism suspect seized in the United States as a criminal suspect pursuant to statutes that proscribe engagement in terrorist activity focuses the narrative on the alleged terrorist activity, rather than his status as "warrior," thereby deconstructing the terrorist narrative. The heroism of armed conflict against the enemy becomes the cowardice of anonymous violence against innocent victims. The aspiring member of a great army, when isolated to his crime, becomes a small-minded individual.

About a warrior held in a military prison an extravagant mythology may be erected; but the fellow in the dock of a public trial, forced to witness the deliberate presentation of evidence of his cowardice becomes pathetic. His narrative loses the power to inspire. Like Ramzi Yousef, Fawaz Yunis, and many others convicted of terrorist acts in U.S. courts, he may soon be forgotten. Thus, the Director of National Intelligence's National Counterterrorism Center has urged intelligence professionals to

> Never use the terms "jihadist" or "mujahideen" in conversation to describe the terrorists. A mu-

> jahed, a holy warrior, is a positive characterization in the context of a just war. . . . Calling our enemies jihadists and their movement a global jihad unintentionally legitimizes their actions.

Counterterrorism Communications Center, National Counterterrorism Center, Office of the Director of National Intelligence, *Words that Work and Words that Don't: A Guide for Counterterrorism Communication*, March 14, 2008, at 2; *see also* Memorandum from the U.S. Dep't of Homeland Security, Terminology to Define the Terrorists: Recommendations from American Muslims 3 (Jan. 2008) ("The consensus is that we must carefully avoid giving bin Laden and other al-Qaeda leaders the legitimacy they crave, but do not possess, by characterizing them as religious figures, or in terms that may make them seem to be noble in the eyes of some.").

General Clark has also made this point:

> By treating such terrorists as combatants . . . we accord them a mark of respect and dignify their acts. And we undercut our own efforts against them in the process. . . . If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves. . . . [T]he more appropriate designation for terrorists is not "unlawful combatant" but the one long used by the United States: "criminal."

Wesley K. Clark & Kal Raustiala, *Why Terrorists Aren't Soldiers*, N.Y. Times, Aug. 8, 2007, at A19.

In sum, the government's argument that national security concerns justify and require the indefinite

military imprisonment of Mr. al-Marri as an enemy combatant is precisely backwards. Using the paradigm of the "war on terror" and the label "enemy combatant" to justify the indefinite military detention of individuals seized inside the United States does not preserve our national security; it threatens it.

B. Unwavering Commitment To America's Fundamental Values Makes Our Nation Strong And Is Essential To Protect The Nation Against The Terrorist Threat.

Discrediting the terrorist narrative and offering a positive alternative – *i.e.*, a narrative of equality, justice, and commitment to the rule of law – is critical to effective counterterrorism strategy. The national security benefits of adhering to our fundamental principles are broadly understood. *See* Office of the Executive, National Strategy for Combating Terrorism, 2 (Feb. 2003) (The Bush Administration declared, in the 2003 National Strategy for Combating Terrorism, "We will use the power of our values to shape a free and more prosperous world. We will employ the legitimacy of our government and our cause to craft strong and agile partnerships."); Michael German, *Squaring the Error*, *in* Law vs. War: Competing Approaches to Fighting Terrorism 11, 15-16 (Strategic Studies Institute, U.S. Army War College, 2005) ("This is a battle for legitimacy, and as such, it is one that we should easily win. As an open and free democracy regulated by the rule of law, we offer a future of peace and prosperity that the jihadist movement does not. . . . Respect for the rule of law, international conventions, and treaty obligations will not make us weaker, it will engender international cooperation and good will that make it impossible for

extremist movements to prosper."), *available at* http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=613; Dr. Kenneth Payne, *Waging Communication War*, Parameters: U.S. Army War College Quarterly, Summer 2008, at 37, 45 ("[E]ffective communication rests on credibility; communications that are not believed are simply hot air.").

Ultimately, the most credible voices revealing the emptiness of the terrorist narrative will be Muslim voices. However, these voices are more likely to be heard if American policies do not hand a megaphone to al Qaeda and their ilk.

The reality of a United States that is willing to fairly prosecute the terrorism suspect in a public trial will diminish and discredit the terrorists' lies and strengthen the credibility of the counter-narrative. This is how violent extremism will ultimately be defeated.

In the words of President Obama, "We know that to be truly secure, we must adhere to our values as vigilantly as we protect our safety – with no exceptions." President-Elect Barack Obama, Remarks at Announcement of Intelligence Team (Jan. 9, 2009).

CONCLUSION

The decision in this case will reinforce one of two narratives – our own or the terrorist's – and thereby either aid or encumber the Nation's ongoing counter-terrorism efforts. The Court should reverse.

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ADDENDUM

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